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Centralization by Construction and Interpretation of the Constitution.

AN ADDRESS DELIVERED IN THE ASSEMBLY CHAMBER, CAPITOL, ALBANY, N. Y., BEFORE THE NEW YORK STATE BAR ASSOCIATION, AT ITS THIRTIETH ANNUAL MEETING, JANUARY 15TH, 1907, AND REPRINTED FROM THE THIRTIETH ANNUAL REPORT OF THE PROCEEDINGS OF THE ASSOCIATION.

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Centralization by Construction and Interpretation of the Constitution.

The President of the United States in a speech made at Harrisburg on the fourth of last October, after referring to evils springing from the growth and prosperity of the country, the conditions produced by industrial changes, and the necessity for governmental action, said:

> "In some cases this governmental action must be exercised by the several States individually. In yet others it has become increasingly evident that no efficient State action is possible, and that we need, through executive action, through legislation and through judicial interpretation and construction of law, to increase the power of the federal government."

On the 12th of December last, in New York, Mr. Secretary Root, after referring to the changed conditions in the sentiments and business and social habits of the country, the tendency to do through national action things formerly done through the action of the several States, the obligation of the States to correlate their action to the welfare of the country at large, the stimulation by a failure to perform such duty to an "appeal to the general government to exercise control over matters that have been considered the exclusive right of the States," said:

> "It is useless for the advocates of State's rights to inveigh against the supremacy of the constitutional

laws of the United States or against the extension of national authority in the fields of necessary control, where the States themselves fail in the performance of their duty. The instinct for self-government among the people of the United States is too strong to permit them long to respect any one's right to exercise a power which he fails to exercise. The governmental control which they deem just and necessary they will have. It may be that such control would better be exercised in particular instances by the government of the States, but the people will have the control they need either from the States or from the national government, and if the States fail to furnish it in due measure, sooner or later constructions of the Constitution will be found to vest the power where it will be exercised in the national government."

These statements announced the doctrine of centralization by construction and interpretation of the Constitution. In asking your attention to some observations upon them and the principles which they involve, I am moved by no spirit of party, but only by the conviction that such declarations bearing the imprimatur of such great names should challenge the consideration and respectful judgment of all thoughtful Americans, and especially of the American lawyers.

They were made with deliberation, upon important public occasions, with full knowledge that they would ring round the world, by earnest men, of deep convictions, who do not trifle in phrase-making, and whose whole minds and hearts are consecrated to the welfare of the American people. With the directness and courage of Luther when he nailed his theses on the door of the

church at Wittenberg, they have challenged all comers to high debate. I am not presumptuous enough to enter the lists as a champion, but only make bold to perform the humble office of a herald, to proclaim upon what issues the gage has been thrown down, believing that it will be lifted by worthy representatives of the great American bar, which in its defense of the integrity of the Constitution has always been

> "Constant as the Northern Star
> Of whose true fixed and resting quality
> There is no fellow in the firmament."

These utterances cannot in the least be minimized by opposing to them the personnel of their authors, for the one has achieved the highest success at a bar where competition is the greatest, and has with phenomenal rapidity won an international reputation as a diplomat which lifts him to the exalted plane of his great predecessor; and the other, for character and ability, is held in higher esteem, both in America and abroad, than any other living man. Those who oppose their doctrines cannot answer them by arrogating to themselves a higher patriotism, for the one has, that he might serve his country, abandoned professional emoluments that few men in any age have had to sacrifice and what yet fewer would have the courage and self-denial to sacrifice. The other, inspired with the deepest moral sincerity, and a passion for righteousness, is as it were, constantly burning with a rage almost divine to advance his country's standard to the highest excellence.

Let us understand the full meaning of what they have said. Both are so direct and clear that no interpretation or construction is required. A man who runs may read. The President says that, in respect of some evils, it is evident "that no efficient State action is possible." A

failure of governmental duty is declared and in analogy to the maxim *Ubi jus, ibi remedium*, a panacea is offered,—the substitution of a more efficient government. Therefore there is a need "through judicial interpretation and construction of law to increase the power of the federal government."

Mr. Root says that so long as the States fail in the discharge of their functions to measure up to the standard that public opinion demands, such dereliction "will increase the disposition of the people to appeal to the general government to exercise control over matters that have been considered the exclusive right of the States." The people here meant are certainly those of other States, and possibly some who do not participate in the control of the culprit States. The appeal is, to have matters that have been considered as exclusively within the reserved powers of the several States, controlled by the federal government, and is not to be made to the American people to effect this change by altering the Constitution, but to the general government as now constituted. This is followed hard by the statement that it is useless for the advocates of State's rights to inveigh against "the extension of national authority in the field of necessary control where the States themselves fail in the performance of their duty." Then referring to these dissatisfied people, he says:

> "The governmental control which they deem just and necessary they will have,"

and the conclusion of the whole matter is thus stated:

> "Sooner or later constructions of the Constitution will be found to vest the power where it will be exercised in the national government."

The only difference between the two is that the President says that we *need* an increase of power in the national government through judicial interpretation and construction, while Mr. Root says that if the States do not reform, sooner or later such increase of power *will* be acquired by constructions of the Constitution. The one implies sanction, and may be fairly regarded as the assertion of a dogma, while the other declares to such States, "Thou are weighed in the balances and art found wanting," and with deep solemnity of prophetic forecast warns them that, if they do not mend their ways, their kingdom will be divided and given over to another.

A power expressly given to the federal government may become effective by judicial action, and an implied power so given may, under conditions not heretofore demanding application, through judicial interpretation and construction, be made manifest, and its potentiality invoked, but this would not be in any sense an increase of power. To increase governmental power fixed by the Constitution, power must be added to power already possessed. All power not in the federal government is expressly reserved to the States by the Tenth Amendment. The power here sought to be added is the power that some of the States fail to exercise satisfactorily. Power recognized as belonging to each of the States is, on account of the dereliction of some, to be transferred from all the States to the general government. Is it probable that States which exercise such powers justly and effectively, will willingly surrender them, because other States do not attain to the same standard? This transfer is not to be made by amendment as provided for in Article five of the Constitution, but by interpretation and construction of the Constitution. This doctrine is revolutionary and dangerous to our national life.

The Constitution is being exploited as never before.

The present time will only permit a reference to a few instances.

No vision is so alert, far-seeing and penetrating as that of commercial competition. In all ages, when it has been advantageous by indirection to promote its cause, it has stimulated and even created, movements appealing to religion and philanthropy, and enlisted in its services the noblest sentiments of humanity.

Child labor, at ages and under conditions that no enlightened State should and no just State would tolerate, is employed by manufacturers, who, on account of the cheapness with which they can transmute human lives and the hopes of useful citizenship into vendible products, either undersell, or make a larger profit than their competitors. Those whose business is directed either by a humanity that will not coin tender childhood into money, or controlled by States that shield helpless labor against remorseless greed, cry out for protection.

Generous souls are enlisted in the cause. Barbarity must be restrained, and the citizenship of the Republic rescued from physical, mental and moral degradation. Remedies through the action of the separate States are thought to be either inadequate or too slow. A plan that will operate promptly and effectively over the whole field of wrong must be devised. Inasmuch as the general government has power to regulate commerce among the several States, the scheme is resorted to of having Congress protect such manufacturers directly, and correcting State abuses indirectly, by interdicting the interstate transportation of such child-labor products. Such a result would certainly eliminate the troublesome competition and protect the manufacturer, but if the States should

not respond with adequate laws, the philanthropist would still have to appeal to State action. There is no plan however chimerical that has not its advocates. Under the pretense of regulation, interstate commerce is to be prohibited. The domestic affairs of the State in relation to the subject-matter of commerce, before it has ever begun an interstate movement, are to be subjected to national control; not with any honest intent of legitimately exercising a power, but for the perfectly transparent purpose of perverting the use of a power, to effect by indirection, what Congress has no right under the Constitution to do.

Chief Justice Marshall said:

> "It is a general rule, that what cannot be done directly from defect of power, cannot be done indirectly." (Wayman v. Southard, 10 Wheat. 50.)

And again:

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." (McCulloch v. Maryland, 4 Wheat. 316, 423.)

Under modern conditions fortunes beyond the dream of avarice are accumulated with phenomenal rapidity. Envy and discontent are aroused. Many regard such vast aggregations of wealth under one control, as dangerous to the general welfare, and threatening to our social

and political institutions. The federal Constitution is scanned for a remedy, and the taxing power is invoked. It is proposed to curb the evil by the imposition of an inheritance tax. No end, however desirable, should be sought by an abuse of power. The perversion of a constitutional power violates the integrity of the Constitution. The power to tax is the power to destroy, but not a power conferred for the purpose of destruction.

While the limitations of the purposes for which taxes may be levied by Congress address themselves to the legislative discretion rather than to judicial determination, the bounds set by the Constitution are none the less binding. The taxing power of Congress is limited to raising revenue for paying the debts, and providing for the common defense and general welfare of the United States.

Mr. Hamilton and Mr. Jefferson both agreed in the construction that "Congress is not to lay taxes *ad libitum* for any purpose they please; but only to pay the debts and provide for the welfare of the Union. In like manner they are not to do anything they please, to provide for the general welfare, but only to lay taxes for that purpose." (Judson on Taxation, pp. 636, 637.)

Taxes are burdens or charges imposed upon persons or property to raise money for public purposes. (Cooley on Constitutional Limitations, 7th ed., 678; Loan Association v. Topeka, 20 Wall. 664.)

The lawful exercise of the taxing power by Congress may destroy a business exercised under State authority, as was illustrated by the imposition of a tax upon the circulation of all banks other than national banks, for the manifest purpose of destroying it; but in that case it was held that, in the exercise of undisputed constitutional power, Congress had provided a currency for the whole

country, and could restrain by suitable enactments the circulation as money of any notes not issued under its authority. (Veazie Bank v. Fenno, 8 Wall. 549.)

Even though a power may, in fact, be exercised, not for the purposes of its creation, but as an auxiliary to render another power effective, and though it is a "perplexing inquiry, unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power" (McCulloch v. Maryland, 4 Wheat. 430), such perversion is none the less a violation of the Constitution by the legislative department. A case may arise "where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax" and then, as was suggested by the Supreme Court, it may be considered "whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so." (Knowlton v. Moore, 178 U. S. 109, 110.) The accumulation and ownership of property and its inheritance, are subject alone to the power of the State, except in so far as the national government may lay its hand upon it for revenue purposes. (Knowlton v. Moore, 178 U. S. 58.)

When the government of the United States laid claim to land in the State of New York, devised to it, the Supreme Court held that the devise was void, because a statute of New York forbade land in that State being devised except to natural persons, and to such corporations as were created under the laws of the State. Mr. Justice Field, delivering the opinion of the Court, said:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its

acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. * * * The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the federal government." (United States v. Fox, 94 U. S. 320.)

The moral sense of the whole country becomes shocked by revelations in regard to the management of insurance companies. The State officers immediately inaugurate drastic measures, which in many instances operate unjustly to the companies. The complaint is now reversed. It is of over-action, rather than of non-action. Insurance companies prefer the regulation of one to that of many sovereignties. In the opinion of many people, State regulation, though not inefficient, is harmful. The commerce clause is drafted into service, and it is sought to supersede the authority of the States by substituting that of the general government, although probably no question has been more positively determined by the Supreme Court than that insurance is not commerce, and that Congress has no authority to assume jurisdiction over it.

In response to the open and vehement demands of labor organizations, pressed when hostile sentiment against railroads stimulated by every art of the demagogue had reached high tide, the Employers' Liability Act was passed in June, 1906. This is not a forum for me to discuss its constitutionality. It has within the last few days been held unconstitutional in two separate cases, one decided by a United States Judge in Kentucky and the other by a United States Judge in Tennessee. It is sufficient for my

purpose to say that even a casual reading of it by an experienced lawyer shows that several serious constitutional questions are involved. It embraces all common carriers engaged in trade or commerce between the States or with foreign nations, even though interstate commerce is but a part of their business, and they are likewise engaged in strictly intrastate commerce. It applies to all the employes of such common carriers, including those who render no service in the transportation of interstate commerce, such, for instance, as engineers of local trains, section hands, mechanics in car and machine shops, clerks in offices and coal-heavers for stationary engines. It embraces all kinds of injuries, and proposes to abolish the fellow-servant doctrine in States where it is recognized, and this even as between employes totally dissociated from interstate transportation. It limits the rights of employer and employes to agree upon the terms of employment. It establishes a rule for the distribution of damages recovered, at variance with those in force in a number of the States. All of these provisions are predicated alone upon the power of Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The bill is founded apparently upon the theory that, the right to regulate commerce includes the right to regulate the carrier engaged in such commerce, and that, after the manner of a Court of Equity, which having acquired jurisdiction for one purpose, will entertain it for general relief, the regulation can embrace not only the common carrier in its relations to interstate commerce, but every person or instrumentality controlled by such carrier, however foreign their uses may be to interstate transportation. Thus through this *ligamen*, domestic affairs of States are sought to be taken from under their control.

In addition to these questions, the inquiry arises whether the act is in any sense a regulation of interstate commerce and so within the power of Congress, and if it be a regulation of interstate commerce, whether, inasmuch as it also provides for regulation of *intrastate* commerce, it is unconstitutional under the well-settled doctrine that if it be unconstitutional in a part which is not severable it must fall altogether. (United States v. Reese, 92 U. S. 214; Trade Mark Cases, 100 U. S. 82; I. C. R. R. Co. v. McKendree, 27 Sup. Ct. Rep. —.)

There is another consideration, in connection with this act, of serious import. It was passed, notwithstanding all that it involved, in respect of the relations between the States and the general government, through both houses of Congress without a call for the Ayes and Noes, which implied either that it was considered to be a measure of minor importance, or that the differences of opinion in respect of it were so slight as not to demand a record of the vote.

Has it come to pass that a proposed act, which shows on its face to any casual observer who has even an elementary knowledge of constitutional law, that the right of the States to regulate their domestic affairs is seriously involved, is too trivial to arouse serious debate? The discussions upon its constitutionality were of the most informal character. There was a time in the history of the Republic when no measure involving such a doubt could pass without a thorough test upon all constitutional grounds. There were always some devoted patriots, who not as partisans seeking party advantage, but as guardians of the sanctity of our institutions, were ever vigilant. When the rights of the States were involved, however long the watch or covert the attack, it could be said of some men of the South:

"They thought they slept,
The Sons who kept
The names of olden sires,
And slumbered while the darkness crept
About their vigil fires;
But aye the golden horseshoe Knights
Their old dominion keep,
Their foes have found enchanted ground
But not a Knight asleep."

Let us now consider the relations between the States and the federal government.

The Constitution of Great Britain, gradually developed through six centuries of national life, was established by authority of the government.

Magna Charta, the first written formulation of English civil rights, and political liberties, though based on the Saxon laws, and extorted at Runnymede, derived its authority from the King.

The Petition of Rights, and Bill of Rights, though quasi-constitutional compacts between the King and the people, were enacted by Parliament under royal consent.

All of them, including the Bill of Rights, though it declares that its provisions "shall stand, remain, and be the law of this nation forever," can be abolished by the government.

As was said by James Wilson:

"The British Constitution is just what the British Parliament pleases."

The national life of England did not begin with the Constitution. It does not continue by virtue of it. The government did not derive its powers through the Constitution. The Constitution came into being only because it was sanctioned by the government. If every principle of it should be abrogated, their nationality and right of government would survive. When the colonies

declared their independence they did not *ipso facto* become a nation. They carried with them no Constitution which bound them together as one body-politic, or from which *proprio vigore* a general government would arise. They might have sought their happiness as independent sovereigns. They might have fused by general acquiescence, and without formal agreement, and in the long lapse of time evolved a national life. But civilization had advanced too far for such tedious processes, and war already rife demanded concert of action and some form of governmental unity. The Articles of Confederation were adopted for a "perpetual union between the States," but each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States.

It was a "league of friendship" between sovereign States (Gibbons v. Ogden, 9 Wheat. 1), which provided that "a Committee of the States" appointed by Congress should during the recess of Congress manage "the general affairs of the United States."

Every alteration of the Articles had to be confirmed by the Legislature of every State.

Then followed our Constitution, ordained and established in order to form a more perfect Union. This was the first written Constitution creating an independent sovereignty. An institutional government brought into being at once, supreme as to certain enumerated powers, but in perpetual relations with other governments exercising without limit other sovereign powers, could not be created, with any expectation of stability, except by a written Constitution. Here is presented the converse of the English Constitution. Our Constitution makes the government. "It was then that a nation was born."

(Miller on the Constitution, 83.) If the Constitution be abolished the government created by it will not survive. The Supreme Court, speaking by Chief Justice Chase, said:

> "The States disunited might continue to exist. Without the States in union there could be no such political body as the United States." (Lane County v. Oregon, 7 Wall. 76.)

It also said:

> "Without them (the States), the general government itself would disappear from the family of nations." (Collector v. Day, 11 Wall. 125.)

The Constitution was written that its terms might be perpetually preserved, without dispute as to the words in which they were expressed. Mr. Cooley says:

> "A Constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written Constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until

they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a Court or Legislature which should allow a change in public sentiment to influence it in giving to a written Constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the Legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a Court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a Court has occasion to pass upon it." (Cooley, Constitutional Limitations, 7th ed., pp. 88, 89.)

Another learned commentator upon the Constitution, Mr. Tucker, says:

"In these American States the history and usage for more than a century has settled that the structure of government and the definition of its powers by the body-politic should be prescribed in a written

Constitution, leaving no honest pretext for transcending the bounds fixed thereby, in the uncertainty of near historic precedents and customs. Sworn to obey that written Constitution, the officer who violates it must stand convicted of a perjured usurpation of authority." (Tucker on Constitution of the United States, vol. 1, p. 68.)

"The idea that usurpation or necessity or a supposed extension as the consequence of custom or progress of society can make jural any power not constitutionally conferred is contrary to American political science, fatal to the liberties of the people, and is only a wicked pretext for the violation of sworn obligations. Such an idea would really mean this — that persistent usurpations of power by a government, acting under the prescribed limitations of a written Constitution, could amend and change that Constitution, which by its terms can only be amended and changed by the body-politic itself. It would make the government a self-creator of its own powers, instead of the creation of the body-politic with only delegated powers. It would take sovereignty from the people and vest it in their government; and transfer all political authority by flagrant usurpation from the body-politic to the omnipotent government. Written Constitutions would be destroyed, and the self-usurped omnipotence of irresponsible government would be erected upon their ruins." (Tucker on Constitution of the United States, vol. 1, p. 67, sec. 54.)

We must test the theory in regard to increasing the power of the general government, advanced by the President and Mr. Secretary Root, by what are accepted as established principles of constitutional law.

I rejoice that the question of States' rights is no longer sectional. It is a noteworthy fact that when the Income Tax was held to be unconstitutional on the ground that it invaded the right of the States, two of the dissenting Justices who upheld the power of the national government were ex-Confederate soldiers. Those rights remaining with the several States after the adoption of the *post bellum* amendments, should be, and doubtless are, as dear to all, as they are to any single State. Questions will arise, out of conditions, such for instance as those involved in the schooling of Japanese in San Francisco, which affect peculiarly a State or group of States, but the constitutional principle involved is just as likely to be invoked in behalf of other States, upon conditions totally dissimilar.

There are now no peculiar institutions that make an irrepressible conflict between the States. Closed forever is the great debate, beginning almost with the birth of the Republic, enduring longer, enlisting more great intellects and developing more impassioned eloquence, bitterness and hate, than any known in the history of Parliaments. Becoming acute in 1820 in the agitation over the Missouri Compromise, assuming the fearful aspect of nullification and civil war in the tariff discussion of 1832, calming down under the benign but temporary anodyne of the compromise measures of the period of 1850, when the great triumvirate swayed the destiny of the nation, it culminated in that eventful and sensational drama, in which the Southern Senators, in speeches pathetic and eloquent, surrendered their commissions, to cast their fortunes with the new Confederacy,— a drama in which was presented the strange spectacle of one of its most thrilling scenes being enacted by Senator Baker of Oregon, and Senator Benjamin of Louisiana, two sons of

Great Britain, born in the same year, transplanted in childhood to American soil, one to the North, the other to the South. The one a hero in three wars of his adopted country, foremost at the bars of three States, bubbling over with generous philanthropy, a Bayard in high courage and gentle courtesy, leaving the Senate to uphold his proud words by brave deeds, like Brunswick's fated chieftain,

"— rushed into the field, and, foremost fighting, fell."

The other, the most accomplished Senator, the most brilliant debater of his time, the ablest defender of secession, left the Senate to consecrate his great genius to a cause whose righteousness he believed in even to his death, and after seeing it go down in defeat, became a fugitive and an exile to his fatherland, and there claiming a citizenship that was his right by birth, in a career unprecedented for rapid and enduring professional success, became the recognized premier of the English bar, and passed into that constellation of legal luminaries, whose brilliancy will endure so long as the gladsome light of Anglo-Saxon jurisprudence shall continue to shed its beneficent rays. There is a profound teaching illustrated by the devotion of these two men, not to the manner born, to opposing principles under whose influence they were brought by the chance that fixed their environment! How impressive the lesson of such influences, when we are considering the effects that may come from sowing in the minds of the people seeds that may fructify into convictions that will provoke a controversy of even more tremendous issues than those involved in the Civil War!

The contest so long maintained between the advocates of a strict and those of a liberal construction has passed

into history. Notwithstanding the fierce opposition once existing, which found its highest official utterance in a veto message of President Jackson, no one now questions the doctrines laid down by the great Chief Justice that "the government of the Union, though limited in its powers, is supreme within its sphere of action"; that it "though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding'"; that "let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." (McCulloch v. Maryland, 4 Wheat. 316, 405, 406, 421.)

As was said by Chief Justice Chase:

> "It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words 'all laws necessary and proper for carrying into execution' powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government." (Hepburn v. Griswold, 8 Wall. 615.)

It was announced with equal emphasis by Mr. Justice Story, speaking for the entire Court, that "the government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the

powers actually granted, must be such as are expressly given, or given by necessary implication" (Martin v. Hunter's lessee, 1 Wheat. 326), and by Marshall, that the national Constitution "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States." (Barron v. Mayor, etc., of Baltimore, 7 Pet. 247.)

When the country was yet torn by the passions aroused by the Civil War, and the assertion by the seceding States of the extreme doctrines of States' Rights, and when the entire sentiment of the dominant part of the people was unanimous for the excision of every principle that would foster a right in the States that would impair any of the legitimate powers of the federal government, a unanimous Court, speaking through Chief Justice Chase, said:

> "But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union there could be no such political body

as the United States.' (County of Lane v. State of Oregon, 7 Wall. 76.) Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." (Texas v. White, 7 Wall. 700, 725.)

It was declared by Chief Justice Waite and concurred in by Justices Miller, Field, Bradley, Swayne, Davis and Strong, that:

"Within its legitimate sphere, Congress is supreme, and beyond the control of the Courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the Courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people." (United States v. Reese et al., 92 U. S. 214, 221.)

Mr. Justice Miller in his treatise on the Constitution, after reviewing the history of our country and the decisions expounding the Constitution, says:

"While the pendulum of public opinion has swung with much force away from the extreme point of State's Right doctrine, there may be danger of its reaching an extreme point on the other side. In my opinion, the just and equal observance of the rights

of the States, and of the general government as defined by the present Constitution, is as necessary to the permanent prosperity of our country, and to its existence for another century, as it has been for the one whose close we are now celebrating." (Miller on the Constitution, 24.)

In the Slaughter-House Cases the Court said:

"Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

"But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held with a steady and an even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts." (16 Wall. 36, 82.)

There has never been the slightest departure by the Supreme Court from the principles thus enunciated. Within the last year, in the case of Hodges v. United States (27 Supreme Court Reporter, 6), in which it was

held that an Act of Congress making it an offense against the United States for private individuals to compel negro citizens by intimidation and force to desist from performing their contracts of employment, was unconstitutional, and that the remedy must be sought through State action and State tribunals, the Court, after referring to the three *post bellum* amendments, speaking through Mr. Justice Brewer, said:

> "Notwithstanding the adoption of these three amendments, the national government still remains one of enumerated powers, and the 10th Amendment, which reads, 'the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,' is not shorn of its vitality." (Hodges v. United States, 27 Sup. Ct. Rep. 6, 8.)

These doctrines thus expounded are so deeply imbedded in the minds, so securely entrenched in the hearts, of the American people, that they are the vital element of our national life, the bed rock that supports the structure of our Union, the chart of our Ship of State. No power recognized as belonging to the States can ever be taken away through governmental action, but only by the people and in the way they have foreordained.

But a new doctrine of the respective rights and spheres of action of the Nation and the States, and of the way in which it may be made effective, is propounded, and that great patriot and jurist, James Wilson, is made its sponsor. It is described as "big with possibilities for the future, and potent to prove the solvent for every constitutional problem involved in the delicate questions resulting from State individuality and national sovereignty."

Wilson said in a letter, that it should be made clear that there were neither vacancies nor interferences between the limits of State and national jurisdictions, and that both jurisdictions together composed only one uniform and comprehensive system of government and laws, and this is interpreted to mean that, whenever the States cannot act, because the need to be met is not one of merely a single locality, then the national government, representing all the people, should have complete power to act. To illustrate: the business of insurance is not merely of a single locality and it is asserted by many that the States cannot effectively control it, and so, notwithstanding that it is not interstate commerce, and there is no express power of the Federal Government, and no power necessary for carrying out an express power, under which jurisdiction over it can be assumed, a power must be derived from the supposed necessities arising from the mere volume and territorial expansion of the business.

In an argument made when the Articles of Confederation were in force, upon the inherent right of the United States to organize a bank, Wilson said:

> "Whenever an object occurs, to the direction of which no particular State is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this extended nature."

This doctrine, announced before our compromise Constitution was adopted, before the Tenth Amendment to it was passed, is proclaimed by an apostle of the new creed who is of sufficient prominence to obtain a hearing in the North American Review, as a true exposition of the rights of the States under our Constitution.

See how reckless a propagandist may become. After quoting the passage just recited, he says:

> "Yet committees of the Congress, while knowing the necessity for sane federal action concerning some of the corporations engaged in business beyond the borders of the State of domicile, whose acts thereby extend from and beyond the State of origin into the Nation at large, deem the Congress restricted by phases of the doctrine of State rights; and even judicial committees, ignorant of the spirit of the Constitution *as expounded by Wilson*, believe the legislative branch of the Government paralyzed by reason of the judicial development of a *dictum* which crept into a decision of the Supreme Court, to the effect that insurance is not a subject of interstate commerce, wholly ignoring the fact that federal control may be sustained on far broader and more fundamental principles of constitutional interpretation than those governing the mere construction of the interstate commerce clause of the Constitution." (North American Review, Mid-November issue, 1906; Vol. 183, No. 8.)

If one be amazed at the manifest error of the assertion that Wilson in the passage quoted expounded our present Constitution, his voice will cling to his jaws at his further statement that "Ere the Constitution left the skilled hands of the fathers, there was incorporated in it the provision that 'The Congress shall have power to . . . provide for the . . . general welfare of the United States.'"

What an emasculation this is of the constitutional provision that: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts

and provide for the common defense and general welfare of the United States"!

Comment could not be too severe upon an attempt to indoctrinate the public mind upon fundamental principles of our government by putting before it a clause of the Constitution so barbarously eviscerated. I do not dim the lustre of Wilson's great name, in protesting against his declarations in letters, and arguments under the old Confederation, being exalted into authority to sustain the doctrine that our system of government, as expounded by a long line of decisions of great judges of all political faiths, can be essentially changed by a new theory of interpretation and construction.

Wilson's views of nationalization, as above set forth, would, if embodied in the Constitution, have defeated its adoption. It was ratified by the convention of his own State only after tremendous opposition, and then with a negative of twenty-three out of a total of sixty-nine votes. The only case involving the right of a State in which he expounded the Constitution was that of Chisholm against Georgia. Rejecting the unequivocal opinions of Marshall and Hamilton, the contemporary exposition which showed without doubt that the framers of the Constitution did not intend that a State should be sued in a Federal Court by a citizen of another State, he claimed warrant for his conclusions from "the direct and explicit declaration of the Constitution itself." (Thorpe, Constitutional History of U. S., II, pp. 266, 273.) The decision of Wilson and Jay, says Justice Bradley, created a shock throughout the country. (Hans v. Louisiana, 134 U. S. 1.)

The day following the decision, a representative of Massachusetts gave notice that he would propose a resolution to amend the Constitution. On the following day

an amendment was proposed in the Senate. Georgia, New York, Massachusetts and Maryland protested. The vote for the proposed amendment, which followed the phraseology of Gallatin, was twenty-three to two in the Senate and unanimous in the House. (Thorpe, Constitutional History of U. S., II, pp. 288-292.)

It may be that a Constitution framed upon the views held by Wilson would have been better than the compromise Constitution, which was the strongest in its national features that then was acceptable to the people, but however grand his conception, it is a perversion of all history to make it a guide for constitutional interpretation.

There is no warrant in any of Wilson's utterances, for judicial amendment of the Constitution. In his speech at the Convention in Pennsylvania advocating its adoption, he said:

> "The truth is, that in our governments, the supreme, absolute and uncontrollable power remains in the people. As our constitutions are superior to our legislatures; so the people are superior to our constitutions. * * * If the error be in the legislature, it may be corrected by the Constitution; if in the Constitution, it may be corrected by the people." (Wilson's Works, Andrews Edition, Vol. I, pp. 543, 544.)

This is the sound doctrine, and is wholly at war with the idea that the government which the people have created can itself increase its power, or that such power can be augmented except by the people acting in the way provided by the Constitution.

The development of this revolutionary theory is obstructed by an exegesis of the Constitution, venerable for its age, and the great judges who have given it sanc-

tion. It is proclaimed by the President that "Certain judicial decisions have done just what Wilson feared," that many of them are "erroneous and a danger to the country." The remedy proposed is a shrinkage of the powers of the States, and an increase of the power of the federal government, by judicial interpretation and construction of the Constitution.

I believe in an increase of the power of our national government, that it should be made adequate to control everything affecting the general welfare of the people of the United States that the States cannot effectively deal with, but that it should come in the way the people themselves have provided. The Constitution has had fifteen amendments. Whatever the people want can be obtained by amendment, except that no State without its consent shall be consolidated with another State, or deprived of its equal suffrage in the Senate.

Mr. Lincoln in his first inaugural said:

> "This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."

He had been elected on a platform that declared:

> "That the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political fabric depend."

If it be objected that the process for amendment is too slow for this lightning age, the answer is that it was so

made, that the Constitution might not rest upon the unstable and ever shifting ground of spasmodic public opinion. The present Chief Justice, speaking of amending the Constitution, said:

> "The ultimate sovereignty may be thus called into play by a slow and deliberate process, which gives time for mere hypothesis and opinion to exhaust themselves, and for the sober second thought of every part of the country to be asserted." (Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 635.)

To say that the very forces that make the exigency for an extension of the power of the national government, will be corrupt enough and strong enough to prevent the adoption of proper amendments, is an impeachment of both the courage and honesty of the American people. If it has come to that, can a government resting upon a citizenship so degraded and cowardly, be saved by a usurping judiciary?

The judiciary, controlling neither the purse nor the sword, and endowed with no initiative, though in its potentiality for the exercise of direct power, the weakest department of our government, is of all forces the greatest for its conservation. Its strength is moral, and comes from the confidence of the people, that the Court is a sacred temple of an inviolable justice. Though judges may be assailed by popular clamor, and official protest, for righteous deliverances that check the desires of the hour, yet, so long as we are fit to survive as a republic, justice though tardy, will vindicate them. If they ever descend from that high and pure region where judgment should maintain its seat, to the lower range where the storm and stress of politics, and passions, hold sway, if

they cease to maintain that virtue of which it can be affirmed:

> "Her robes she keeps unsullied still,
> Nor takes nor quits her curule chair
> To please a people's veering will,"

they will betray the highest trust ever confided to any human institution, "float wildly backwards and forwards on the irregular and impetuous tides of party and faction," and hasten the end of stable and constitutional government.

When I was a boy in Tennessee, I heard an ex-President of the United States, in a speech of two hours' duration, before an assembly of more than a thousand people standing unsheltered from the intense rays of a summer sun, expound our Constitution. When I now regard the flippancy with which it is often referred to, illustrated by the saying, "What is the Constitution between friends," jocularly quoted, and yet profoundly startling, because it is unfortunately a truthful exposition of a too prevalent spirit of the times, my mind turns with a sense of awe to that picture impressed upon my youthful memory, and it comes back to me now in an aspect that is almost sublime.

The great orators of Greece, no matter what was their theme, generally in their orations passed in review the nature and development of their institutions, the principles that animated the national life, the ways in which their greatness had been achieved.

There should be a general revival all over this land of a knowledge of the Constitution and the theory of our government. There is too much of iconoclasm in religion and law, too much of the spirit of expediency and opportunism, too little of reverence for institutions both human and divine!

We have had one fearful lesson of how, through differences in respect of constitutional rights, we may rush into a political cataclysm, and we should profit by the example.

That a movement has been started that may gain such headway as will profoundly stir the depths of our national life, no thoughtful observer of public events can doubt. It will be a curse to the country if it shall become a party issue. While no true and enlightened patriot will upon such a fundamental question, through party fealty, espouse a doctrine obnoxious to his convictions, or fail to oppose one that his conscience condemns, there will be many who will accept party action as a final adjudication.

For a truly patriotic championship of the integrity of the Constitution, we must look to an enlightened press, to those public men who can put country above party, to the American lawyers who by training and tradition are the defenders of liberty and justice under the established law.

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